Filed 8/23/10 P. v. Aguilar CA4/3

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE, Plaintiff and Respondent, v. OSCAR RIOS AGUILAR, Defendant and Appellant.	G042349 (Super. Ct. No. 06SF0141) O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, David A. Thompson, Judge. Affirmed.

Nancy L. Tetreault, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Gary W. Schons, Assistant Attorney General, Gil Gonzalez, Deputy Attorney General, for Plaintiff and Respondent.

* * *

Defendant Oscar Rios Aguilar appeals from a final judgment of conviction following a jury trial. He claims covert telephone calls made by the victim at the behest of law enforcement to secure incriminating statements from him should not have been admitted at trial as the calls violated his Fifth Amendment right to remain silent. He further claims the trial court erred prejudicially by failing to adequately instruct the jury on the need for unanimity. Lastly he claims Evidence Code section 1108, which permits the jury to rely on a finding of guilt on one count to show defendant's propensity to commit sexual offenses, violates his right to due process and equal protection. We affirm.

I

FACTS

Defendant was convicted on 10 criminal counts involving sex crimes against his daughter F.R., including two counts of committing forcible lewd acts on a child under 14 (Pen. Code § 288, subd. (b)(1)); two counts of committing a lewd act on a child who was either 14 or 15 and at least 10 years younger than defendant (Pen. Code § 288, subd. (c)(1)); four counts of committing forcible rape (Pen. Code § 261, subd. (a)(2)); one count of committing sexual penetration by a foreign object by force (Pen. Code § 289, subd. (a)(1)); and one count of incest (Pen. Code § 285). With regard to the counts under Penal Code section 288, subdivision (b)(1), the jury found to be true allegations the defendant had substantial sexual conduct with a victim under 14 years of age. (Pen. Code § 1203.066, subd. (a)(8).) Defendant was sentenced to a total term of 44 years eight months in state prison.

A. *The Abuse*

Defendant began touching F.R. in a sexually inappropriate way when she was 13 years old. At the time F.R. lived with her father, mother, brother, and two sisters

in San Juan Capistrano. The record reflects F.R.'s generic testimony of ongoing sex acts committed on her by defendant. Sex acts occurred two or three times each week in the afternoon after F.R. came home from school. Defendant would put his finger in F.R.'s vagina as well as rub the outside. The majority of the time the sex acts would culminate in sexual intercourse, during which defendant would occasionally wear a condom. The abuse continued until F.R. was 18 years old.

The record also reflects four specific instances of sexual contact. The first occurred while defendant and F.R. were at home alone. Defendant began by touching F.R.'s breasts and vagina under her clothes, and eventually penetrated her vagina with his penis. The sexual intercourse occurred on defendant's bed and ended when defendant pulled his penis out of F.R.'s vagina and ejaculated on her stomach. Defendant then told F.R. to clean up and put her clothes on because her mother would be home soon. When F.R.'s mother came home, F.R. did not tell her what happened because defendant had threatened to kill F.R.'s mother or members of her family if she mentioned what had occurred.

On another occasion defendant entered the shower while F.R. was bathing. Defendant told F.R. he wanted to take a shower with her. She said no and started to cry. Defendant responded, "Shut up, I am going to take one." After defendant took his clothes off and entered the shower, he began to touch F.R.'s breast and vagina. He told her, "Don't tell this to no one or else you know what's going to happen."

When F.R. was 14 and about to start high school, the family moved to a house in a different area of San Juan Capistrano. The sex acts continued, and one night defendant began touching F.R.'s breasts as she slept on the floor in her bedroom. F.R. recalled telling defendant, "No, stop," several times, but he responded, "No. I'm not going to stop."

Defendant's last sex act with F.R. occurred on a Friday when she was 18 years old. F.R. was going to go out with her mother to purchase bread, but defendant told her, "No, you're going to stay [home]." After F.R.'s mother left, defendant told F.R. to go upstairs and to take off all her clothes. F.R.'s brother and sisters were playing outside. Defendant then removed his clothes and began to engage in sexual intercourse with F.R. on the bed. Defendant told F.R., "Don't tell anything to no one[,]" and F.R. started screaming, crying, and telling him to stop. Defendant said, "No. You're going to be my wife and you're going to have kids with me." F.R. said, "No," but defendant continued to have sex with her. Defendant then stopped and told F.R., "Go downstairs 'cause your mom's coming."

When F.R.'s mother returned home, F.R. did not say anything about what had occurred because she was afraid defendant would carry out his threat to kill her or other members of the family. F.R.'s mother saw F.R. crying and asked her, "What do you have?" F.R. responded she had a headache, and her mother told her to take some pills. F.R. then set the table for dinner while defendant and her mother went upstairs to their room. F.R. became fearful because she didn't know what defendant was telling her mother. She thought to herself, "if I don't run from home, he's going to kill me." She didn't call the police because she was afraid. F.R. went to her aunt and uncle's house and asked them to take her to her godparents' home. They asked why and F.R. said, "Just take me there."

F.R. fainted in the car while her aunt and uncle were driving her to her godparents' home. They took her to the hospital where she was found to have low blood pressure. She told no one at the hospital of the abuse because she was afraid.

After leaving the hospital, F.R. went to her godparents' home, where she told them "everything that happened." F.R.'s godparents encouraged her to tell the police, but she did not call them until three weeks later.

According to F.R.'s mother, F.R. went to live with one of F.R.'s maternal aunts upon release from the hospital. About two weeks later F.R. told her mother about the abuse, that it had been ongoing since she was 13, and included sexual contact and sexual intercourse. When F.R.'s mother confronted defendant with this information, he admitted sexual activity but did not get into specifics. He only said he had abused F.R. and didn't know why. When her mother asked F.R. why she hadn't said anything about the abuse earlier, F.R. told her she kept quiet because defendant had threatened her. F.R.'s mother recalled witnessing an argument between defendant and F.R. regarding her wanting to have a boyfriend.

B. *Child Sexual Abuse Accommodation Syndrome (CSAAS)*

Dr. Veronica Thomas, an expert on child sexual abuse accommodation syndrome (CSAAS), explained victims of father-daughter incest react differently to their abuse than generally expected. The syndrome consists of five components: secrecy, where the adult abuser establishes a rule that the child victim will not talk about what is happening; helplessness, where the child feels complaining about the abuse is hopeless because of the difference in power between the abusing adult and the child; entrapment and accommodation, where the child comes to rationalize the ongoing sexual abuse and accommodate it; disclosure, the first time the child reveals the abuse, which can occur immediately after the abuse or years later; and finally, recanting, where a child may feel responsible for the negative consequences of revealing the abuse and in response take back their initial disclosures of the abuse. CSAAS is a tool for explaining behavior, and does not function to investigate or diagnose molestation.

C. *The Covert Telephone Calls*

After F.R. reported the sexual abuse, an investigator with the sheriff's department asked her if she would make a telephone call to defendant "to confirm that he really did it." F.R. made two calls to defendant on February 10, 2006, one at 2:30 p.m. and another at 3:40 p.m.

During the first covert phone call, F.R. asked defendant to promise he wouldn't touch her the same way anymore. Defendant asked from where F.R. was calling and insisted they meet in person to discuss the abuse, since he was working at the time of the call. F.R. refused, stating she was too afraid to meet. Defendant continued throughout the conversation to insist on meeting in person. F.R. accused defendant of taking advantage of her instead of taking care of her. F.R. told defendant she would call back in an hour, and he assented.

F.R. called defendant again at 3:40 p.m. Defendant told F.R. they could meet in church if she was afraid to meet in person, but F.R. said she wanted to talk on the phone. F.R. told defendant she wanted him to say he regretted all the things he did to her, and mean it. Defendant acknowledged doing and saying "a lot of things" but insisted he never meant to harm F.R. with the things he said. F.R. asked defendant if he felt badly because of what he had done to her. Defendant again insisted on meeting in person "because that's the only way God is going to know . . . ." Defendant said he could not talk on the phone because he was at work and being watched.

Defendant repeatedly denied taking advantage of F.R. or assaulting her. Defendant insisted he never disrespected her or threatened her. Defendant then appeared to acknowledge the abuse but denied it had been happening for five years. F.R. said she had missed her period and might be pregnant with defendant's child. Defendant told her, "You know very well that's not true, [F.R.]."

F.R. pressed defendant to promise he wouldn't have sex with her again, and he responded he would promise "anything" if she would see him in person. Defendant asked F.R. if she was recording the conversation, if this was how she was thinking of turning him in. Defendant then said, "I promise you what you're saying." F.R. responded, "But I want you to say it right now. Why don't you want to say it?" Defendant finally said, "I do admit it, and it hurts me very much. And I don't know what to do, [F.R.]. I told your mother, 'I don't know how I'm going to repair the harm.'" Defendant then said he would do whatever F.R. wanted and he was promising everything she wanted.

F.R. continued to assure defendant no one was there with her. Defendant promised F.R. "we're not going to have anything else." F.R. responded, "'That we're not going to have sex.' I want you to —." Defendant responded, "Nothing." Defendant finally said, "I promise you that I'm not going to have sex with you." He later promised not to put his penis in F.R.'s vagina anymore, and then asked, "What else do you want, [F.R.]? Is that enough for you [to] turn me in?"

Defendant presented no evidence.

II

DISCUSSION

A. *The Covert Telephone Calls Did Not Violate Defendant's Fifth Amendment Right.*

Defendant contends the trial court prejudicially erred by admitting evidence of the two covert telephone calls because the calls violated his Fifth Amendment right against self-incrimination. We disagree.

"A verdict or finding shall not be set aside, nor shall the judgment or decision based thereon be reversed, by reason of the erroneous admission of evidence unless: [¶] (a) There appears of record an objection to or a motion to exclude or to strike the evidence that was timely made and so stated as to make clear the specific ground of

the objection or motion; and [¶] (b) The court which passes upon the effect of the error or errors is of the opinion that the admitted evidence should have been excluded on the ground stated and that the error or errors complained of resulted in a miscarriage of justice." (Evid. Code § 353.)[1] However, this rule is "'subject to the constitutional requirement that a judgment must be reversed if an error has resulted in a denial of due process of law.'" (*People v. Mills* (1978) 81 Cal.App.3d 171, 176.) Although no objection was made to the admission of the telephone calls, we address the merits of defendant's contention.[2]

"In *Miranda v. Arizona* [(1966) 384 U.S. 436], the United States Supreme Court 'determined that the Fifth and Fourteenth Amendments' prohibition against compelled self-incrimination require[s] that custodial interrogation be preceded by advice to the putative defendant that he has the right to remain silent and also the right to the presence of an attorney.' [Citation.]" (*People v. Bradford* (1997) 14 Cal.4th 1005, 1033.) Custodial interrogation "encompasses any situation in which 'a person has been taken into custody or otherwise deprived of his freedom of action in any significant way.' [Citation.]" (*People v. Mickey* (1991) 54 Cal.3d 612, 648.)

"Absent 'custodial interrogation,' *Miranda* simply does not come into play. [Citations.] *Miranda* does not 'prohibit the police from merely listening to . . . voluntary, volunteered statements' uttered by a person, whether or not in custody, 'and using them against him at the trial' . . . . [Citation.] Hence if 'custodial interrogation' is lacking, *Miranda* rights are not implicated . . . ." (*People v. Mickey, supra*, 54 Cal.3d at p. 648.)

Defendant was at his place of work when F.R. made the two telephone calls to him. At the time defendant was not under arrest and was not being questioned by

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[1] All further statutory references are to the Evidence Code, unless otherwise stated.

[2] Because we do not find the issue forfeited on appeal, we do not reach defendant's alternative claim of ineffective assistance of counsel.

police. Even if made at the behest of the sheriff's investigator, these telephone calls and their recording did not constitute custodial interrogation within the meaning of *Miranda*. Defendant was not entitled to receive a *Miranda* warning and nothing barred law enforcement from listening in on and recording the conversations between F.R. and defendant.

Defendant's reliance upon *Missouri v. Seibert* (2004) 542 U.S. 600 is misplaced. At the outset, *Seibert* concerned "a police protocol for *custodial interrogation* that call[ed] for giving no warnings of the rights to silence and counsel until interrogation ha[d] produced a confession." (*Id.* at p. 604, italics added.) There, the police woke the defendant in the middle of the night at the hospital where her son was being treated. (*Ibid.*) The arresting officer followed instructions not to give the defendant *Miranda* warnings. (*Ibid.*) After arrival at the police station the officer questioned the defendant for 30 to 40 minutes without *Miranda* warnings. (*Id.* at pp. 604-605.) The officer gave the defendant *Miranda* warnings only after she had confessed to the crime. (*Id.* at p. 605.) The officer then activated a tape recorder, obtained a *Miranda* waiver, and confronted the defendant with her prewarning statements. (*Ibid.*) The United States Supreme Court concluded this "question-first tactic effectively threatens to thwart *Miranda's* purpose of reducing the risk that a coerced confession would be admitted . . . ." (*Id.* at p. 617.)

Seibert is inapposite to the present facts. Here, defendant was not in custody, and the sheriff's investigator did not use a "question-first" interrogation strategy. *Miranda* warnings were not required because there was no custodial interrogation and as such no duty to inform defendant of his right against self-incrimination. The court did not err in admitting the telephone calls into evidence.

B. *The Trial Court Did Not Err by Not Providing the Jury with CALCRIM Nos. 3501 and 3502.*

The trial court instructed the jury with a modified version of CALCRIM No. 3500 and CALCRIM No. 3515. Defendant does not take issue with those instructions, but contends the trial court erred by failing additionally to instruct the jury with CALCRIM Nos. 3501 and 3502. Although during trial defendant made no objection to the instructions given, we address the merits of defendant's contention.

"In a criminal case, a jury verdict must be unanimous. [Citations.]" (*People v. Russo* (2001) 25 Cal.4th 1124, 1132.) "Additionally, the jury must agree unanimously the defendant is guilty of a *specific* crime. [Citation.] Therefore, cases have long held that when the evidence suggests more than one discrete crime, either the prosecution must elect among the crimes or the court must require the jury to agree on the same criminal act. [Citations.]" (*Ibid*.)

"[E]ven in the absence of a request, a trial court must instruct on general principles of law that are commonly or closely and openly connected to the facts before the court and that are necessary for the jury's understanding of the case. [Citations.]" (*People v. Montoya* (1994) 7 Cal.4th 1027, 1047.) However, "[a] party may not complain on appeal that an instruction correct in law and responsive to the evidence was too general or incomplete unless the party has requested appropriate clarifying or amplifying language. [Citation.]" (*People v. Lang* (1989) 49 Cal.3d 991, 1024.)

"In a case in which the evidence indicates the jurors might disagree as to the particular act defendant committed, the standard unanimity instruction [e.g. CALCRIM No. 3500] should be given. [Citation.] But when there is no reasonable likelihood of juror disagreement as to particular acts, and the only question is whether or not the defendant in fact committed all of them, the jury should be given a modified

unanimity instruction [e.g. CALCRIM 3501][3] which, in addition to allowing a conviction if the jurors unanimously agree on specific acts, also allows a conviction if the jury unanimously agrees the defendant committed all the acts described by the victim." (*People v. Jones* (1990) 51 Cal.3d 294, 321-322.)

Here, the trial court instructed the jury pursuant to CALCRIM No. 3500 as follows: "The defendant is charged in Counts 1 and 2 with lewd act[s] by force or fear on [a] child sometime during the period of 10-5-00 to 10-4-01. [¶] The defendant is charged in Counts 3 and 4 with lewd act[s] on [a] child 14 or 15 sometime during the period of 10-5-01 to 10-4-03. [¶] The defendant is charged in Counts 5, 6, 7 and 8 with rape sometime during the following periods: 10-5-01 to 12-31-02, 1-1-03 to 12-31-03, 1-1-04 to 12-31-04 and 1-1-05 to 1-20-06, respectively. [¶] The defendant is charged in Count 9 with sexual penetration by force sometime during the period of 10-5-01 to 1-20-06. [¶] The defendant is charged in Count 10 with incest sometime during the period of 10-5-01 to 1-20-06. [¶] The People have presented evidence of more than one act to prove that the defendant committed these offenses. You must not find the defendant guilty unless you all agree that the People have proved that the defendant committed at least one of these acts and you all agree on which act he committed." The trial court also instructed the jurors with CALCRIM No. 3515: "Each of the counts charged in this case is a separate crime. You must consider each count separately and return a separate verdict for each one."

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[3] CALCRIM 3501 reads: "The defendant is charged with ___<*insert description[s] of alleged offense[s]*> [in Count[s]___] sometime during the period of ___ to ____. [¶] The People have presented evidence of more than one act to prove that the defendant committed (this/these) offense[s]. You must not find the defendant guilty unless: [¶] 1. You all agree that the People have proved that the defendant committed at least one of these acts and you all agree on which act (he/she) committed [for each offense]; [¶] OR [¶] 2. You all agree that the People have proved that the defendant committed all the acts alleged to have occurred during this time period [and have proved that the defendant committed at least the number of offenses charged]."

Defendant contends the trial court erred in failing to sua sponte instruct the jury pursuant to CALCRIM 3501. This instruction is an alternative to CALCRIM 3500. "If the court concludes that the modified [unanimity] instruction is appropriate, give this instruction. If the court determines that the standard unanimity instruction is appropriate, give CALCRIM 3500, *Unanimity*." (Judicial Council of Cal., Crim. Jury Instns. (Summer 2010) Bench Notes to CALCRIM No. 3501, p. 963.) CALCRIM 3501 provides two different approaches for the jury to reach the required unanimity. The first is the same as that set forth in CALCRIM 3500: agreement as to the acts constituting each offense. But unanimity may also be found under CALCRIM 3501 when the jury agrees "that the People have proved that the defendant committed all the acts alleged to have occurred during this time period [and have proved the defendant committed at least the number of offenses charged.]" Even were we to assume error here, it would be harmless. The jury found defendant guilty following one of the two alternative means of arriving at unanimity under CALCRIM 3501. The jury was instructed that to convict it must agree on the act committed. "[W]e must presume the jury understood and followed the instructions." (*People v. Prince* (2007) 40 Cal.4th 1179, 1295.) The fact that the court failed to instruct the jury it could also properly convict defendant through a different approach did not prejudice defendant.

Defendant also contends the trial court erred by failing to instruct the jury with CALCRIM No. 3502.[4] We disagree.

"When an accusatory pleading charges the defendant with a single criminal act, and the evidence presented at trial tends to show more than one such unlawful act,

[4] CALCRIM No. 3502 reads: "You must not find the defendant guilty of ___<*insert name of alleged offense*> [in Count ___] unless you all agree that the People have proved specifically that the defendant committed that offense [on] ___<*insert date or other description of event relied on*>. [Evidence that the defendant may have committed the alleged offense (on another day/ [or] in another manner) is not sufficient for you to find (him/her) guilty of the offense charged.]"

either the prosecution must elect the specific act relied upon to prove the charge to the jury, or the court must instruct the jury that it must unanimously agree that the defendant committed the same specific criminal act. [Citation.] The duty to instruct on unanimity when no election has been made rests upon the court sua sponte. [Citation.]" (*People v. Melhado* (1998) 60 Cal.App.4th 1529, 1534.)

Here, CALCRIM No. 3502 was not required because nothing in the record suggests the prosecution elected to rely upon a specific factual basis for any of the charged offenses. The specific instances of sexual abuse went to apprise the jury of the types of acts defendant would engage in with F.R. Such evidence was necessary to validate F.R.'s generic testimony. (See *People v. Jones, supra*, 51 Cal.3d at p. 316.) The prosecutor pointed out to the court that multiple acts covered each count. The prosecution never relied upon the specific acts to represent any of the individual counts alleged. CALCRIM No. 3502 was not applicable to this case, and the trial court's failure to instruct the jury with CALCRIM No. 3502 was not error.

C. *Defendant's Rights to Due Process and Equal Protection Were Not Violated by Application of Evidence Code Section 1108 and CALCRIM No. 1191.*

Defendant contends the application of section 1108 and CALCRIM No. 1191 violated his constitutional right to due process by permitting the jury to find him guilty under less than a reasonable doubt. He further contends the application of section 1108 and CALCRIM No. 1191 violated his right to equal protection of the laws. Although defendant raises these claims for the first time on appeal, we consider them on the merits.

In applying section 1108, the trial court provided the jury with a modified version of CALCRIM No. 1191. The instruction reads: "The People presented evidence that the defendant committed the crimes of lewd act on a child and forcible rape. These

crimes are defined for you in these instructions. [¶] If you decide that the defendant committed one or more of these offenses beyond a reasonable doubt, you may, but are not required to, conclude from that evidence that the defendant was . . . likely to commit and did commit other charged acts of lewd act on a child and forcible rape. If you conclude that the defendant committed one or more of these offenses beyond a reasonable doubt, that conclusion is only one factor to consider along with all the other evidence in determining whether he committed other charged sexual offenses. It is not sufficient by itself to prove that the defendant is guilty of other counts of lewd act on a child and forcible rape. The People must still prove each charge and allegation beyond a reasonable doubt." (Some capitalization omitted.)

"[E]vidence of a person's character or a trait of his or her character . . . is inadmissible when offered to prove his or her conduct on a specified occasion[,]" except in strictly circumscribed situations. (§ 1101, subd. (a).) This is so because "a defendant must be tried for what he did, not for who he is. The reason for [such a] rule is that it is likely that the defendant will be seriously prejudiced by the admission of evidence indicating that he has committed other crimes. [Citations.]" (*United States v. Myers* (1977) 550 F.2d 1036, 1044.)

Section 1108, subdivision (a) provides an exception to the rule barring evidence of a defendant's propensity to commit a presently charged crime: "In a criminal action in which the defendant is accused of a sexual offense, evidence of the defendant's commission of another sexual offense or offenses is not made inadmissible by Section 1101, if the evidence is not inadmissible pursuant to Section 352." Section 352 states, "The court in its discretion may exclude evidence if its probative value is substantially outweighed by the probability that its admission will (a) necessitate undue consumption of time or (b) create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury."

Our Supreme Court has found section 1108 comports with due process requirements. (*People v. Falsetta* (1999) 21 Cal.4th 903, 916.) Section 1108 preserves trial court discretion to exclude propensity evidence if its admission would be overly prejudicial. (*Id.* at p. 907.) "Rather than admit or exclude every sex offense a defendant commits, trial judges must consider such factors as its nature, relevance, and possible remoteness, the degree of certainty of its commission and the likelihood of confusing, misleading, or distracting the jurors from their main inquiry, its similarity to the charged offense, its likely prejudicial impact on the jurors, the burden on the defendant in defending against the uncharged offense, and the availability of less prejudicial alternatives to its outright admission, such as admitting some but not all of the defendant's other sex offenses, or excluding irrelevant though inflammatory details surrounding the offense. [Citations.]" (*Id.* at p. 917.) "[T]he trial court's discretion to exclude propensity evidence under section 352 saves section 1108 from defendant's due process challenge." (*Ibid.*) Section 1108 does not offend due process requirements.

Citing *Cooper v. Oklahoma* (1996) 517 U.S. 348, 367, defendant also contends section 1108 violates due process because it offends some fundamental principles of justice. However, as noted above our Supreme Court has rejected federal due process challenges to section 1108 and stare decisis obligates this court to follow that ruling. (*Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455.)

Defendant also contends section 1108 violates the principle of equal protection, both facially and as applied in this case. Although our Supreme Court has not squarely addressed an equal protection challenge to section 1108, in *Falsetta* the court endorsed *People v. Fitch* (1997) 55 Cal.App.4th 172, a Third District decision rejecting an equal protection challenge to section 1108. (*People v. Falsetta, supra*, 21 Cal.4th at p. 918.) In contrast to defendant's assertion section 1108 is subject to strict scrutiny analysis, "[a]n equal protection challenge to a statute that creates two classifications of

accused or convicted defendants, without implicating a constitutional right, is subject to a rational-basis analysis. [Citation.]" (*People v. Fitch*, *supra*, 55 Cal.App.4th at p. 184.) "[S]ection 1108 withstands this relaxed scrutiny." (*Ibid.*)

Here, defendant argues the lower recidivism rate of sex offenders compared to other types of offenders is at odds with the rule allowing the admission of propensity evidence in the trials of alleged sex offenders. As in *Fitch*, this argument is unavailing. "The Legislature [has] determined that the nature of sex offenses, both their seriousness and their secretive commission which results in trials that are primarily credibility contests, justifie[s] the admission of relevant evidence of a defendant's commission of other sex offenses. This reasoning provides a rational basis for the law." (*People v. Fitch*, *supra*, 55 Cal.App.4th at p. 184.) Accordingly we conclude the trial court did not err in instructing the jury pursuant to CALCRIM No. 1191.

III

DISPOSITION

The judgment is affirmed.

MOORE, J.

WE CONCUR:

BEDSWORTH, ACTING P. J.

IKOLA, J.